Supreme Court, U.S.
FILED
OCT 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-373

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

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CHARLES REED AND ROLAND DUTY,
PETITIONERS

V.

JAMES TERRELL, SUE RAYBOLD, BILL LOGUE,
JOE JOHNSON, AND THE STATE BAR OF TEXAS,
RESPONDENTS

---

ON WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
FIFTH CIRCUIT

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# BRIEF FOR RESPONDENT THE STATE BAR OF TEXAS IN OPPOSITION TO CERTIORARI

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EDITOR'S NOTE

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## STATEMENT OF THE CASE

Respondent has included this statement because Petitioners' statement is argumentative and conclusory. Moreover, Petitioners' statement creates the impression that the matters recited therein were presented as evidence to the trial court. There was no evidentiary hearing in this case.

Petitioners Charles Reed and Roland Duty filed this suit in the United States District Court for the Western District of Texas, Waco Division. A copy of the live pleading in the case is reproduced in the Appendix of this brief. They alleged that the imposition of attorney's fees against them as parties in divorce actions was unconstitutional because the statute which allowed awards of attorney's fees in such cases, Tex. Fam. Code Ann. §11.18(a), was applied in a discriminatory manner against men. Named as defendants in the suit were

the attorneys who represented Petitioners' ex-wives (Respondents Terrell and Raybold), the state district judge who heard the divorce actions (Respondent Logue), the clerk of the court in which the divorce actions were filed (Respondent Johnson) and this Respondent, the State Bar of Texas.

The gist of Petitioners' argument against Respondents Terrell, Raybold, Logue and Johnson was that these individuals had acted in concert to cause Tex. Fam. Code Ann. §11.18(a) to be enforced in a discriminatory manner. Petitioners alleged that there were no ascertainable standards to which judges could refer in the exercise of their discretion in determining whether one party in a divorce action would pay the other party's attorneys fees. Petitioners claimed that this lack of guidelines permitted judges and wives' attorneys to discriminate against

the class of ex-husbands by requiring them to pay their former spouses' attorneys fees even when such awards were unjustified.

The allegations against the State Bar of Texas concerned the content of a seminar on family law presented by the State Bar and the existence of a conspiracy of fixed prices. Petitioners alleged that in that seminar, attorneys were instructed to advise their female divorce clients to withdraw all funds from joint bank accounts and to conceal the money in various ways. Petitioners allege that attorneys were further instructed to represent falsely to the court that their female clients were without funds to pay their fees and to request that the husbands be required to pay them.

The price-fixing allegation consisted of a vague statement that the State Bar and local lawyers in Petitioners' communi-

ty set minimum fees to overcharge them and other husbands.

Petitioners made the conclusory allegation that they had exhausted any state remedy at law that might have been available to them. They requested that the court declare §11.18(a) unconstitutional; declare that all orders issued pursuant to that statute are void; grant injunctive relief to prevent further enforcement of such orders in their cases; assess compensatory and punitive damages; and award attorneys fees connected with the suit.

All Respondents filed motions to dismiss. No evidentiary hearing was held. The district court granted these motions, noting that the Petitioners' complaint was in essence an attack on state court judgments which had not been reviewed by Texas appellate courts. A copy of this Order of Dismissal may be found in the Appendix of Petitioners' brief. Additional reasons

for dismissal mentioned in the court's Order of Dismissal included the failure of Petitioners to state a federal cause of action on which relief can be granted.

Petitioners appealed to the Fifth Circuit Court of Appeals. The first four points of their brief simply repeated and elaborated on the allegations made in their petition. In the fifth point, they alleged that their allegation of "action in concert" by the various defendants should have been sufficient to withstand a motion to dismiss. The sixth point complained of the trial court's denial of their motion to amend their petition to include additional allegations of attempts by their ex-wives' attorneys to collect their fees. Finally, the seventh point concerned the lack of notice given of the hearing on the motions to dismiss.

In a concise opinion, the Fifth Circuit affirmed the district court's dismis-

sal of the case. Petitioners have included a copy of that opinion in the Appendix of their brief. The Fifth Circuit opinion described the allegations against the State Bar of Texas as having no merit. The Court of Appeals agreed with the district court's view that this case is essentially an attack on a state court judgment which a federal district court may not consider.

## SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Fifth Circuit properly applied the holding of District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303 75 L.Ed.2d 206 (1983), to the case at bar and concluded that the district court lacked jurisdiction to decide Petitioners' claims because they were inextricably intertwined with the state court's decisions. Petitioners' failure to state a federal claim on which relief

could be granted also supports the trial court's action.

## ARGUMENT

In District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), this Court held that federal district courts have no authority to review final judgments of state courts. The Feldman decision recognized a small category of cases which had been adjudicated in state courts but presented issues which could be determined in federal district courts. These cases involve a general challenge to the constitutionality of a state rule rather than requiring a review of a state court's final judgment.

Petitioners have employed the terminology of civil rights cases to frame their complaints. They have cited 42 U.S.C. §1983 and alleged that requiring them to pay attorneys fees in unconstitutional.

However, this construction of the issues is forced. This is obvious from their characterization of husbands as a suspect class to demonstrate a denial of equal protection. It is also obvious from the contradictions inherent in their petition: the allegation that the State Bar's legal education program advised attorneys to conceal wives' assets in order to obtain attorney's fees pursuant to Tex. Fam. Code Ann. §11.18(a) implies that state courts apply that statute on the basis of need rather than in a impermissibly discriminatory manner.

A more realistic view of Petitioners' claim is that it is nothing more than a complaint that the state court abused its discretion in assessing attorney's fees. The petition consists of a litany of actions taken against Reed and Duty in their state cases and the request for re-

lief is directed at remedying the effect of those actions.

The Fifth Circuit was correct in finding that Petitioners were attempting to obtain review of state court judgments in their federal suit and that the federal district court lacked jurisdiction to do so. Petitioners' argument that Migra v. Warren City School District Board of Education, 104 S.Ct. 829 (1984), dictates another result is incorrect. Migra held that litigants who fail to raise claims in state court suits will be precluded from raising those claims in §1983 actions in federal court to the same extent as in subsequent state actions. Under Migra, it is clear that Petitioners' claims are barred by their failure to raise them in state court. This decision does not provide any support for retention of the case by the district court nor do the cases cited in Petitioners' second point which

appears to be much the same argument as in their first point.

No Cause of Action on Which the Federal Court May Grant Relief

No facts were alleged by Petitioners which demonstrated that the attorneys fees statute was unfairly applied in their cases. Except for a few specific references to dates and amounts of attorneys fee awards, the entire petition consists of vague and conclusory statements.

The State Bar of Texas was not alleged to be responsible for the promulgation, interpretation or enforcement of Tex. Fam. Code Ann. §11.18(a). Furthermore, the absence of any allegation connecting the acts which the State Bar allegedly committed and any harm to Petitioners (or to anyone else) reveals that the claim against the State Bar is simply frivolous.

## CONCLUSION

The district court correctly dimissed this case because it lacked jurisdiction to sit in direct review of the state court's judgments. The Petitioner's failure to state a cause of action on which relief may be granted also justified the district court's dismissal.

The Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals should be denied and pursuant to 42 U.S.C. §1988 and U.S. Sup. Ct. Rule 49.2, Respondent's attorneys fees in responding to this Petition should be assessed against the Petitioners.

Respectfully submitted,

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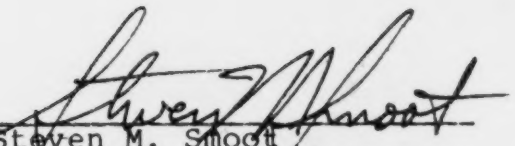
By 
Steven M. Smoot
State Bar Card No. 18774300

ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I, Steven M. Smoot, counsel of record for Respondent State Bar of Texas, do hereby certify that on this the 10th day of October, 1985, three (3) copies of the above and foregoing Brief for Respondent were served by mail on the following:

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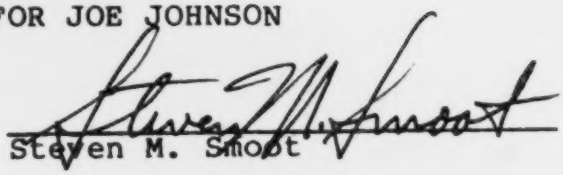

Steven M. Smoot

# APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

CHARLES REED, and
ROLAND DUTY; Plaintiffs

W-82-CA-75
JURY TRIAL
REQUIRED

V.

JAMES TERRELL and SUE RAYBOLD, individually and as officers of the Courts of Texas and members of the State Bar of Texas; BILL LOGUE, individually and as Judge of the District Court of McLennan County, Texas; JOE JOHNSON, individually and as Clerk of the District Courts of McLennan County, Texas; and THE STATE BAR OF TEXAS; Defendants

VERIFIED AMENDED COMPLAINT FOR MONETARY DAMAGES AND DECLARATORY AND INJUNCTIVE RELIEF

1. This action for declaratory and injunctive relief and monetary damages arises under the Fourteenth Amendment to the United States Constitution, Title 15, United States Code Section 1 et seq., and Title 42, United States Code Sections 1983, 1985, and 1986. The matter in controversy exceeds, exclusive of interests and costs, the sum of Ten Thousand Dollars ($10,000). This Court has jurisdiction

under 28 United States Code Sections 1331, 1343, 2201, 2202, and 2281.

2. All individual parties are citizens of the United States and of Texas.

3. Both plaintiffs are members of the class "husbands or former husbands" and have a direct interest in the integrity, equality, and justness of the family court division of the District Courts of Texas, in maintaining equality at law for all litigants in the family court division of the District Courts of Texas, and in insuring compliance with all Constitutional provisions and laws designed to preserve the foregoing interests, specifically the last two clauses of Section I of the Fourteenth Amendment, the "due process" clause and the "equal protection" clause, and the antitrust laws of the United States.

4. Defendants James Terrell and Sue Stepp Raybood, hereinafter Terrell and

Raybold, respectively, are both attorneys at law, admitted to the Defendant State Bar of Texas under color of law, and acting at all times herein under color of state law.

5. Defendant Bill Logue, hereinafter Logue, is Judge in the family court division of the District Court of McLennan County, Texas, admitted to the Defendant State Bar of Texas under color of law, and acting at all times herein under color of state law.

6. Defendant Joe Johnson, hereinafter Johnson, is the Clerk of the District Courts of McLennan County, Texas, and acting at all times herein under color of state law.

THE DUE PROCESS CLAUSE

7. The Fourteenth Amendment's next-to-the-last clause of Section 1 provides as follows:

> No state shall . . . deprive any person of life, liberty,

> or property, without due process of law.

This clause sought to prevent, and prevents, the arbitrary dispossession and seizure of property under the color of state law, and the arbitrary punishment of any person under color of state law for pursuit of his legal rights and remedies.

THE EQUAL PROTECTION CLAUSE

8. The Fourteenth Amendment's last clause of the First Section provides as follows:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

This clause sought to prevent, and prevents, discrimination, under color of state law, against any classification, including classification by sex, whether such discrimination is obvious on the face of the state law, or is exercised by enforcement of the law, fair on its face,

with a "heavy hand or an evil eye" so as to discriminate against any class.

THE U.S. ANTITRUST LAWS

9. The Sherman and Clayton Acts, Title 15, United States Code, Section 1 et seq., provide that interstate trades, including the practice of law, shall not be practiced so as to injure, obstruct, or overcharge one group or classification of customers or consumers to the benefit of another.

TEXAS FAMILY CODE AND CIVIL CASE LAW

10. Section 11.18(a) of the Texas Family Code provides as follows:

> In any proceeding under this subtitle, including but not limited to habeas corpus, enforcement, and contempt proceedings, the court may award costs. Reasonable attorney's fees may be taxed as costs, and may be ordered paid directly to the attorney, who may enforce the order for fees in his own name.

Civil Case Law provides that:

> Attorney's fees are not re-

coverable in an action unless so provided by statute or by contract between the parties. Statutes which authorize recovery of attorney fees are penal in nature and will be strictly construed. (Marriage of Neidert, 583 S.W.2d 461)

APPLICATION OF DUE PROCESS OF LAW

11. Section 11.18(a) of the Texas Family Code contains no "ascertainable standards" upon which a defense can be made against its application, is completely "arbitrary" and "discretionary," is "vague and idefinite," is incapable of being "strictly construed," denies the right to "cross-examine the accusor" or even to be accused, "chills the ardor" to pursue one's rights, and for each of these reasons is a denial of due process of law to anyone against whom it is applied.

APPLICATION OF EQUAL PROTECTION OF THE LAW

12. Section 11.18(a) of the Texas Family Code contains no references to gender and appears fair on its face, but in

practice, is administered with a heavy hand and an evil eye in family law cases, in that, to the plaintiffs' knowledge, legal fees are not assessed against guilty or innocent defendants in criminal cases, no matter how wealthy, or how apparent the guilt, or how deliberate and vicious the acts of the defendant, nor are legal fees assessed against litigants in civil matters other than domestic litigation, such as personal injury and other tort case, breach of contract, contempt or civil conspiracy litigation, no matter how wealthy the litigant. In addition, to the Plaintiffs' knowledge, no wife or ex-wife has ever been assessed the husband's or ex-husband's legal fees in a family court case. Members of the class "husbands" are thus denied, in McLennan County Courts, the equal protection of the law in divorce and other family court litigation.

CIVIL CONSPIRACY

13. Since before April 12, 1978, the named individual Defendants, and other individual members of the Defendant State Bar of Texas have conspired to cause, and have caused, the provisions of the Texas Family Code concerning legal fees to be enforced in a discriminatory manner against men, and have entered these discriminatory and unconstitutional orders and caused executions to be issued on the basis of these unconstitutionally discriminatory orders. "Defendants have also conspired to cause, and have caused, lawyers specializing in family law in Texas to be instructed to conspire with female divorce clients to commit, and they have committed, grand larceny by fraud, conversion, and the stealing and concealing of joint family funds to buy jewelry and other valuables." Defendants have also conspired to force, and have forced, the payment of wives' lawyers' fees by the un-

constitutional use of legal contempt procedures.

OVERT ACTS

14. In effecting the goals of the above-described conspiracy, the Defendants, and others knwn and unknown to Plaintiffs, have, at various times, and in various places, in McLennan County and elsewhere in Texas, performed the following overt acts:

A. On April 12, 1978, and on May 19, 1978, Defendant Raybold unconstitutionally requested that Plaintiff Duty be required to pay $2,900 in legal fees for his wife's divorce litigation, and on July 17, 1978, Plaintiff Duty was ordered by Defendant Logue to pay $2,900 in unconstitutional legal fees to Defendant Raybold, and this order was entered by Defendant Johnson, so that it might be enforced, and it was enforced, by Defendant Raybold, even though Defendant Raybold's clent had

been awarded sufficient property, and owned sufficient property, and had sufficient earning power to pay her own attorney's fees.

B. On November 1, 1979, Plaintiff Reed was ordered to pay Defendant Terrell $819.27 in legal fees by Defendant Logue, even though such an order was not legal according to Rule 131 of the Texas Rules of Civil Procedure for the reason that Plaintiff Reed was a successful party, and the order was entered by Defendant Johnson, so that it might be enforced, and it was enforced, by Defendant Terrell, even though Terrell's client had been awarded and owned sufficient property, and had sufficient earning power to pay her attorney's fees.

C. On January 29, 1981, Plaintiff Reed was ordered to pay Defenant Terrell $2,500 in domestic legal fees by Defendant Logue, after an unconstitutional request

for such fees from Defendant Terrell, and this order was entered by Defendant Johnson, so that it might be enforced, and Defendant Terrell has attempted to enforce it. Defendant Reed paid all but $2,490 of the unconstitutional fee, whereupon Defendant Terrell wrote, and filed, and caused to be served on Plaintiff Reed, an action seeking to restrain Plaintiff Reed from refusing to accept and cash his Veterans Administration paychecks in the future and not turning the proceeds of such cashing over to Defendant Terrell, without any limit on such cashings and payments. See Exhibit A, attached hereto, the order of Judge Logue setting up the hearing for April 16, 1982. Defendant Logue ordered a hearing on April 16, 1982, at which Plaintiff Reed will be unconstitutionally required to meet the burden of proof as to why the order would not be entered against him.

D. On November 12, 19__, Defendant State Bar of Texas held a legal education program in family law, for which credit was granted toward family law certification, and instructed the Defendant members of the State Bar in attendance that they should have their female divorce clients steal all the money in the family joint checking and savings accounts, and purchase jewelry and other valuables with the money, any pay legal fees "deposits" with the funds obtained, and that the lawyers should then ask the courts to "award" such jewelry to their female clients, and also ask for legal fees from the husbands, falsely and fradulently representing that the wives did not have sufficient property to pay legal fees for themselves.

CAUSES OF ACTION

15. Defendants' actions, as described in Paragraphs 13 and 14, in preparing, arguing, and filing applications

for legal fees against the husbands or former husbands in favor of the wives or former wives, extorting payment under threat of imprisonment for debt, and the fraud on the state courts by the Defendant lawyers and State Bar of Texas, are violations of 18 United States Code Sections 241, 242, 42 United States Code Sections 1983, 1985, and 1986, and the Due Process and equal Protection clauses of the Fourteenth Amendment to the United States Constitution. There is no great state or societal benefit justifying the exercise of such discriminatory enforcement of the Texas Family Code setting up an inherently-suspect class "husbands."

16. Plaintiffs have suffered greatly economically and emotionally from Defendants' conduct in exercising these statutes and rules unconstitutionally, and illegally, and have suffered greatly by being discriminated against in the restraint of

trade and "price discrimination" in violation of the equal protection of the law, and such conduct on the part of the Defendants has frustrated the purpose of the Texas Family Code set forth in Paragraph 10 above, and the federal laws set forth above, which purposes were to provide to all persons due process of law and protection from discrimination under color and pretense of state law, statute, regulation, custom, or usage, and protection against monopolistic acts in any trade and business.

17. As a direct consequence of the aforesaid conspiracy to violate, and violations, Plaintiff's have suffered, and will continue to suffer, great and immediate, irreparable injury in that their liberty is restrained, and their property is in jeopardy. They are required to take steps to protect themselves against the enforcement of the unconstitutional orders

against them, and/or retain counsel at great difficulty and expense, with payments to said counsel illegally controlled by the previously-enforced minimum fee schedule and the present tacit agreement of McLennan County lawyers and the State Bar of Texas, contrary to Title 15, United States Code Sections 1, 2, 13, and 15.

18. Plaintiffs have suffered mental pain and anguish at being forced to pay, or suffer imprisonment and loss of visitation with their children, for failure or inability to pay, unconstitutionally assessed legal fees of a discriminatory nature, which fees are used to pay lawyers for instructing their clients to commit the crimes described in the Pre-Divorce Counselling instruction books of the continuing legal education classes of the Defendant State Bar of Texas.

19. Plaintiffs have suffered mental pain and anguish, and other injury and out

of pocket expenses, totalling the sum of $28,000 each.

20. Plaintiffs have no adequate remedy at law, and have exhausted any state remedy at law that might have been available to them. The only available remedy by which Plaintiffs might assert their direct and substantial interest in securing compliance with the provisions of Title 18 United States Code Sections 241, 242, and 72 United States Code Sections 1983, 1985, and 1986, and the due process and equal protection of the law is to bring this action.

RELIEF SOUGHT

Wherefore, Plaintiffs request that this Court:

A. Declare that Section 11.18(a), Texas Family Code, as it is applied and enforced by the family courts of McLennan County, Texas, is unconstitutional, that all outstanding orders for payment under

this statute against the Plaintiffs are null, void, and unenforceable, that any payments made by Plaintiffs under this statute to Defendants are to be refunded immediately and that any orders arising from criminal or quasi-criminal or civil contempt proceedings against any of the Plaintiffs in the family courts of McLennan County, Texas are unconstitutional and unenforceable, and direct Defendant Johnson to strike any such unconstitutional orders from the records of the District Courts of McLennan County, Texas.

B. Grant a Temporary Restraining Order preventing and restraining the Defendants, and their agents, associates, and employees from making, entering, or enforcing any order against Plaintiff Reed that he must endorse and cash any and all of his future Veterans Administration paychecks and turn any or all of the proceeds over to Defendant Terrell.

C. Upon hearing, which should be scheduled as soon as possible, issue preliminary and permanent injunctions preventing Defendants from exercising any benefits from any of the unconstitutional orders outstanding against any of the Plaintiffs, and effecting the above-requested declaratory relief permanently.

D. Require that any sums paid to any of the Defendants by any of the Plaintiffs under the unconstitutionally-administered Section 11.18(a) of the Texas Family Code be refunded by the Defendants to the Plaintiffs involved, with interest at 15% from the time of the original payment to the Defendants.

E. Convene a petit jury to assess damages jointly and severally against the Defendant lawyers and curt clerk in the sum of $28,000 compensatory damages for each Plaintiff, and assess treble damages against the Defendant lawyers and court

clerk, jointly and severally, as punitive damages for violation of the Sherman and Clayton anti-trust laws.

F. Order such costs, disbursements, and attorney's fees, if any, or reasonable sums in lieu of attorneys' fees, to which the Plaintiffs may be entitled from the Defendants.

G. Order such other and further relief as the Court may deem appropriate.

By the Plaintiffs,
Pro Se

Charles Reed
1212 North 65th St.
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Phone: 817-772-3788

Roland Duty
703 North Valley Mills Drive
Waco, Texas 76710
Phone: 817-772-1532

STATE OF TEXAS, COUNTY OF McLENNAN:

I, Charles Reed, first being duly sworn, depose and say as follows:

1. That I am a plaintiff in the above-entitled cause, W-82-CA-75.

2. That I have read the complaint in the above-entitled cause; and

3. That all factual statements and allegations made therein are true, as to those of which I have direct knowledge, and as to all those facts and allegations of which I have no direct knowledge, I believe them to be true, to the best of my information, knowledge, and belief.

Signed May ____, 1982

_____
Charles Reed

Subscribed to and sworn before me this ___ day of May, 1982.

My Commission Expires:

_____

_____
Notary Public

STATE OF TEXAS, COUNTY OF McLENNAN:

I, Roland Duty, first being duly sworn, depose and say as follows:

1. That I am a plaintiff in the above-entitled cause, W-82-CA-75.

2. That I have read the complaint in the above-entitled cause; and

3. That all factual statements and allegations made therein are true, aas to those of which I have direct knowledge, and as to all those facts and allegations of which I have no direct knowledge, I believe them to be true, to the best of my information, knowledge, and belief.

Signed May ____, 1982

_____
Roland Duty

Subscribed to and sworn before me this ___ day of May, 1982.

My commission expires:

_____

_____
Notary Public